

Kevin D. Balkwill
Board of Professional Responsibility
Supreme Court of Tennessee
10 Cadillac Dr. Suite 220
Brentwood, TN 37027

July 29, 2019

Dear Mr. Balkwill,

We are in receipt of Mr. Faughnan's reply to our Board complaint and Mr. Northcott's statement contained therein. We want to reserve time to fully address Mr. Faughnan's arguments and appreciate the extension you have granted us.

However, upon the filing of our initial complaint, Mr. Northcott's video-recorded public statements only provided the appearance of impropriety. Mr. Northcott's written reply to the complaint removes all doubt as to his current defiance of the rule of law and intent to further engage in conduct beneath the decency required of our profession along with raising serious questions as to his competency and fitness to practice.

We are so alarmed by the assertions made in Mr. Northcott's own words that we must, at this time request, pursuant to Tennessee Supreme Court Rules 8, §§6 and 7 of the Preamble, Rules of Professional Conduct 1.1, Rule 9 § 1.1, Rule 9 § 12.3, this disciplinary Board immediately petition the Tennessee Supreme Court for emergency, temporary suspension of Mr. Northcott's license to practice law. During this suspension, we ask the Court and this Board to conduct an examination of Mr. Northcott's competence and require him to reaffirm his oath as an attorney in the State of Tennessee.

This request is based solely upon Mr. Northcott's own video-recorded public statements and his written personal reply to the complaint and as such, this letter will only address those statements. Mr. Faughnan's arguments will be addressed in a separate rebuttal.

The Basis for our Request is as follows:

I. MR. NORTHCOTT EITHER WILLFULLY REJECTS THE AUTHORITY OF THE UNITED STATES SUPREME COURT AND THE SUPREMACY CLAUSE, RENDERING HIM UNFIT TO PRACTICE OR IN THE ALTERNATIVE, HE DOES NOT UNDERSTAND THE AUTHORITY OF THE UNITED STATES SUPREME COURT AND THE SUPREMACY CLAUSE AND IS THEREFORE, INCOMPETENT TO PRACTICE LAW.

Mr. Northcott stated, in pertinent part, within his written reply to the Board complaint:

Comment A. "I used the example of domestic violence laws as to how this uncertainty in the law caused by what I believe is an overreach by the U.S. Supreme Court in its 2015 *Obergefell* decision has impacted many areas that that most would not consider...I find myself in a position of balancing many different issues in finding the appropriate way to exercise my prosecutorial discretion in the handling of domestic violence cases as it relates to homosexual relationships...I have a strongly held religious belief that homosexuality is a sin. As such, I have a strongly held belief that I must not do anything that will either condone, promote, or suggest that I agree with such behavior. This is a belief that is shared by the majority of Tennesseans...I know this because the Tennessee Constitution was amended in 2005 to so state this position. I am aware that the U.S.

Supreme Court opinion referenced above declared this statute unconstitutional to the extent it denies government licensing of homosexual marriage. However, it does not negate the clearly established public policy of this State that was made part of our Constitution a decade [earlier]. Thus, whenever an issue on this topic may arise, as a duly elected District Attorney, I find myself in a position of balancing interests, including not just my religious beliefs but the public policy of Tennessee.” Northcott Reply pp. 2-3.

Comment B. “The Constitutionally and statutorily established law and policy in Tennessee is that marriage is between one man and one woman. I personally believe marriage is a contract between one man, one woman, and God. It matters not whether they have formalized this with the government.” Northcott Reply p. 3.

Comment C. “I believe the overall purpose of treating domestic violence cases separately from other assaults is to promote and protect the sanctity of the institutions of marriage and family. Because that is the purpose, I do not believe it is good policy to use the domestic assault statute in situations that don’t involve a marital or familial type of relationship recognized by this state. Northcott Reply p. 3.

Comment D. “At lunch, there was a comment made that nine people in black robes rules us and I would have to disagree with that. Five people in black dresses rule us. When they legislated policy...and that's what they did. If you ever read their opinion, they don't base it on the Constitution, they don't base it upon law, they don't base it on anything.” Northcott’s video-recorded statement in front of the Chafer Theological Seminary, speaking in his capacity as District Attorney. User: InTheGripOfTheLamb, 08 – 2018 – Craig Northcott – The Local Church’s Role in Government, 57:40, YOUTUBE (Mar. 13, 2018), https://www.youtube.com/watch?v=DRZ14A_QYI&feature=youtu.be. (hereafter, “Video-Recorded Statement”)

Comment E. “The Social Engineers on the Supreme Court have decided that we now have homosexual marriage. I disagree with them so I don't prosecute them as domestics.” Video-Recorded Statement at 1:01:08.

Mr. Northcott is clearly rejecting the Supremacy Clause, the authority of the United States Supreme Court and his oath of office. Comments A-B. In doing so, Mr. Northcott has declared himself a sovereign citizen and creator of his own state of government.

Mr. Northcott has stated a belief that Domestic Assault laws exist to protect those in marital relationships yet because he, personally, rejects the marital status of gay people, he will not protect gay victims under these very laws. Comment C. In doing so, he is not only rejecting the authority of the United States Supreme Court, but also Tennessee’s licensure and recognition of marriage for same-sex couples. Comments B-C

Further, in his video-recorded statements previously submitted to this Board and noted above, Mr. Northcott is openly demeaning and critical of the Justices of the Supreme Court and their decision-making process. Comments D-E.

A lawyer is unfit to practice that calls into disrepute the authority of the Court. *Ramsey v. Board of Professional Responsibility* 771 S.W.2d 116, (1989 Tenn.) held “It is the duty of an attorney to refrain from doing anything which will tend to destroy the confidence of the public in the Courts, or to bring the Courts into disrepute. It is the duty of the lawyer to maintain toward the Court a respectful attitude, not for the sake of a temporary incumbent of judicial office, but for the maintenance of its supreme importance.” *Id.* at 12. Mr. Northcott has failed to uphold his obligation to maintain a respectful attitude

to the Courts and is destroying public confidence in the Courts by intentionally undermining their authority.

Tennessee Supreme Court Rule 8, Preamble § 6 states, “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass others.” TN R S CT Rule 8, Preamble & Scope § 6. Section 7 of the Preamble, in pertinent part reads “a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.” *Id.* at § 7.

Mr. Northcott incorrectly states that a balancing interest gives him the power to ignore decisions of the United States Supreme Court or the U. S. Constitution. Comment C. Any attorney who believes he has the power to ignore the decisions of the United States Supreme Court is in violation of his oath and is disqualified from the practice of law.

In the history of the United States, there have been a multitude of situations where the Supreme Court has held a state law to be unconstitutional. As an example, the Court in *Loving v. Virginia* found the Virginia state law banning interracial marriage to be unconstitutional. 388 U.S. 1 (1967). If prosecutors in Virginia adopted Mr. Northcott’s position and decided to continue enforcing unconstitutional state laws rather than submit to the authority of the United States Supreme Court, interracial couples may still be prosecuted for marrying and the prosecutors would be acting in violation of the law.

Rule 1.1 of the RPC states “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” TN R S CT Rule 8, RPC 1.1. Mr. Northcott represents the State of Tennessee and its citizens. Any attorney, much less an elected district attorney, who does not understand the Supremacy Clause, is incompetent under Rule 1.1.

Further, Mr. Northcott is not consistent in his stated allegiance to the Tennessee State Constitution over the decisions of the United States Supreme Court. The Tennessee State Constitution includes a victims’ bill of rights. Tenn. Const. Art. I, § 35. Citizens of the State of Tennessee voted and approved a victim’s amendment that did not exclude any category of victims.

Mr. Northcott is taking a position contrary to a constitutionally protected class: victims of abuse. It is a Tennessee Constitutional mandate that ALL victims have rights and are to be protected equally. *Id.* The legislative branch has already defined victims and that definition makes no distinction between gay or straight individuals. 18 USCA § 3771(e)(2) (2015). Mr. Northcott has decided for himself, declaring in his own words, that gay couples, married or otherwise, are not worthy of victims’ protection. Comments B-C.

II. MR. NORTHCOTT INCORRECTLY BELIEVES THERE ARE NO BOUNDS TO PROSECUTORIAL DISCRETION.

Throughout Mr. Northcott’s written statement he points to his prosecutorial discretion as a basis for his policies as to the application of domestic assault laws. In his video-recorded statement, he brags “DA’s have what’s called prosecutorial discretion. Y’all need to know who your DA is. Y’all give a lot of authority to us. A lot of authority. We can choose to prosecute anything. We can choose not to prosecute anything up to and including murder. Its our choice, unfettered.” Video-Recorded Statement, at 59:31.

While prosecutorial discretion is broad, it is not “unfettered.” *United States v. Batchelder*, 442 U.S. 114, 125 (1979). A rebuttable presumption exists that prosecutions are undertaken in good faith and in a non-discriminatory manner. *United States v. Bassford*, 812 F.2d 16, 19 (1st Cir. 1987). Selectivity in the enforcement of criminal laws is subject to constitutional constraints. *Batchelder*, 442 U.S. at 125. The first constitutional attack is vindictive prosecution, which violates a defendant’s due process rights. The second attack, which is relevant to Mr. Northcott, is selective or discriminatory

prosecution. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Wayte v. United States*, the Supreme Court held that a petitioner seeking to prove selective prosecution must show the decision of whether or not to prosecute was motivated by a **discriminatory purpose**. 470 U.S. 598, 608 (1985)

Under this standard, discriminatory treatment arises if selection “was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Preliminary Proceedings, Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1990-1991*, 80 Geog. L.J., note 31 at 1116-1117.

We take no issue with prosecutorial discretion as it is applied within the bounds of the law but we do take issue with prosecutorial discrimination. You can neither have prosecutorial discretion based in discrimination nor can you have prosecutorial discretion that is inconsistent with the law.

Mr. Northcott believes there are no limits to prosecutorial discretion. A district attorney who believes he can make prosecutorial choices without limitation and for discriminatory purposes, believes he is above the law and poses a substantial threat to the public.

III. ALLOWING MR. NORTHCOTT TO CONTINUE TO PRACTICE LAW POSES A SUBSTANTIAL THREAT TO THE PUBLIC.

Rule 9 §12.3 of the Rules of Professional Conduct specify when Temporary Suspension is appropriate. On petition of Disciplinary Counsel and supported by an affidavit or declaration under penalty of perjury demonstrating facts personally known to affiant showing that an attorney has misappropriated funds to the attorney’s own use, has failed to respond to the Board of Disciplinary Counsel concerning a complaint of misconduct, has failed to substantially comply with a Tennessee Lawyer Assistance Program monitoring agreement requiring mandatory reporting the Disciplinary Counsel pursuant to section 36.1 or otherwise poses a threat of substantial harm to the public, the Court may issue an order with such notice as the Court may prescribe imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both. TN R S CT R.9, § 12.3(a).

Mr. Northcott openly encourages government officials to break the law knowing that he would not criminally prosecute them. In his video-recorded statement, a question is posed to Mr. Northcott about what he would say to a clerk who, in violation of state law, refuses to issue a marriage license to a same-sex couple. Video-Recorded statement at 56:59.

Mr. Northcott’s response is as follows, “As to the clerk, it just boils down to - are you going to do what God says or are you going to do what man says. The clerk will probably lose their job, either immediately or through election if they take a stand on God’s truths. We are not safe from the consequences of standing on the truth. I think you just have to make a decision anytime you hold office that you’re gonna stand on the truth and what consequences come, come. My advice to the clerk would be don’t succumb....So, the deal with that, you elect a good Christian man as DA, you at least make sure they don’t get prosecuted criminally...If your specific situation came to me, I would pat her on the back, give her a hug and say go at it. I wouldn’t be prosecuting.” Video-Recorded Statement at 58:38.

Mr. Northcott is unambiguously stating that under his watch, government officials are free to break the law without fear of criminal prosecution. He goes so far as to make it a campaign promise. What would Mr. Northcott say to a police officer who refuses to respond to a call of violence or vandalism or threats against a gay person out of personal or religious bias? Or to a first responder who fails to render aid to a gay or Muslim person due to religious or personal bias? The gay and Muslim citizens of Coffee County cannot rely on Mr. Northcott to protect them or to demand that the government protect or serve their interests in the same way as other citizens. His statements and biases create a chilling effect on victims who may wish to seek assistance. His statement that “no one has complained to him” is perhaps illustrative of the atmosphere he has created.

Within Mr. Northcott’s written reply to the Board complaint, he asserts there to be no substantial difference in the protections given to victims under domestic assault laws versus regular assault laws. (Northcott written reply, p. 4.) This is disingenuous as within his video-recorded statements, Mr.

Northcott clearly lays out the substantial differences between the ramifications of a domestic assault charge versus an assault charge. Comment C.

In the state of Tennessee, a charge of domestic assault provides a 12-hour hold of a defendant prior to release on bond. Tenn. Code Ann. § 40-11-150(k)(1) (West, Westlaw through 2019 First Reg. Sess.). The purpose of this hold is to give the parties a cooling-off period and to provide a victim with an opportunity to flee or seek safe shelter. See id. An assault charge does not come with this requirement. Tenn. Code. Ann. § 39-13-101 (West, Westlaw through 2019 First Reg. Sess.). A domestic assault conviction precludes a defendant from owning a gun for the duration of his or her life – again, for the protection of victims. *See* Tenn. Code Ann. § 39-13-111(c)(6) (West, Westlaw through 2019 First Reg. Sess.). An assault charge does not come with this prohibition. Tenn. Code. Ann. § 39-13-101. A domestic assault conviction comes with the strong deterrent of a third conviction becoming a felony offense. Tenn. Code Ann. § 39-13-111(c)(3) (West, Westlaw through 2019 First Reg. Sess.). Mr. Northcott understands these distinctions and victim protections. He is simply misrepresenting them to this Board and refusing to protect gay victims.

Due to the power of Mr. Northcott's position, he poses a substantial threat to the public. His statements and policies have a chilling affect on victims. He encourages government officials to break the law without fear of legal retribution. This Board and the Tennessee Supreme Court cannot wait until a gay person is seriously injured or killed in Coffee County due to Mr. Northcott's personal biases and refusal to protect them.

Mr. Northcott's statements are "impermissible remarks to the public that are gross, disrespectful, discriminatory, knowingly false and damaging to the legitimacy of and trust in, the judicial system. His remarks constitute conduct adversely reflecting upon his fitness to practice law, unprofessional conduct and conduct rendering him unfit to be a member of the bar." *Ramsey*, 771 S.W.2d at 120.

Mr. Northcott's reply is "as impressive an indication of incompetence and a lack of remorse for his prior remarks, as it is his further evidence of his individual violations of the disciplinary rules. A lack of remorse is an aggravating factor in determining the type of discipline imposed or the degree of sanctions to be meted out." *Id.* at 121. He has so outrageously misstated the law and his ethical obligations that we can only reach the conclusion that he is both incompetent and unfit for the practice of law.

For these reasons, we respectfully and urgently request that Mr. Northcott be temporarily suspended pending an examination of his competence and a reaffirmation of his oath as an attorney for the State of Tennessee.

Best Regards,

Sunny Eaton

BPR # 025364

On behalf of the 338 members and future members of the Tennessee Bar who are signers and parties to the original complaint.